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CASES CITATIONS

Fuentes v. Shevin, 407 U.S. 67	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

BILL SWAD CHRYSLER-PLYMOUTH CO.,
Petitioner.

565 EAST BROAD, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner, BILL SWAD CHRYSLER-PLYMOUTH CO., prays that a writ of certiorari issue to review the order of the Supreme Court of Ohio rendered in these proceedings on April 26, 1974, in overruling petitioner's motion for an order directing the Franklin County Court of Appeals to certify its record.

OPINIONS BELOW

The order of the Supreme Court of the State of Ohio is unreported and appears at Appendix A, infra, p. 9. The opinion and judgment of the Franklin County Court of Appeals is unreported and appears at Appendix B, infra, pp. 10-21. The opinion and judgment of the Franklin County Court of Common Pleas is unreported and appears at Appendix C, infra, pp. 22-27.

JURISDICTION

The order of the Supreme Court of the State of Ohio

was entered on April 26, 1974. See Appendix A, p. 9, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

The landlord, 565 East Broad, Inc., brought suit and was awarded a judgment against the tenant, petitioner, for rents that had accrued after petitioner had vacated the leased premises and the landlord had restored them for occupancy pursuant to a Building Department order without further notice to petitioner that the premises were again available for such occupancy, although petitioner had previously notified landlord of its option to terminate the lease. The question thereby arising is:

1. Whether the action of the state courts of Ohio in requiring petitioner, who had vacated the premises, to pay rent that accrued after the landlord had restored them for occupancy without first requiring notice to petitioner of such restoration and availability for occupancy is consistent with the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV, Sec. 1:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

The facts relative to the question presented by this petition are introduced to the Court in a summary fashion.

On August 15, 1967, 565 East Broad, Inc., (hereafter called landlord) leased its premises at 1505 East Main Street, Columbus, Ohio, to BILL SWAD CHRYSLER-PLYMOUTH CO., tenant, (hereafter called petitioner) for a period of five years. The pertinent provisions of the lease state:

"Paragraph 4. *Landlord warrants and represents* that it has the right to let the above described premises for the aforesaid term on the terms and conditions herein contained and *that the buildings and improvements*, including the electrical, plumbing and heating equipment (and elevators, if any) and other equipment in the leased premises, *are in first class order and repair*. (Emphasis supplied.)

"Paragraph 6. *Tenant shall make all repairs necessary* to keep the demised premises and the buildings and appurtenances situated thereon in as good order and condition as when delivered to it *except exterior and structural repairs*, repairs to the roof, and such other exterior repairs as may be necessary by reason of ordinary wear and tear, damage by fire, the elements or other casualty, *which Landlord shall make*. Tenant shall be responsible for plate glass. (Emphasis supplied.)

"Paragraph 11. *If the demised premises shall be* partially destroyed by fire, casualty, or other cause or happening, or be *declared unsafe by any lawful authority, then the demised premises shall be promptly* restored or *made safe by Landlord* and a just proportion of the rent specified shall abate until the leased premises shall have been restored or made safe within ninety (90) days after partial destruction or declaration of unsafe conditions; *provided*, however, *that* should said premises not be restored to their former condition and/or *made safe within ninety (90) days from the date of said* partial destruction or *declaration of unsafe condition* thereof, *then the Tenant*, at its option, *may cancel*

> and terminate *this lease* in its entirety and if Tenant exercises the option to cancel, then any unearned rent paid in advance shall be refunded to it." (Emphasis supplied.)

In the latter part of July, 1969, petitioner vacated the premises after notice to landlord, giving as reasons deterioration of the neighborhood and damage to petitioner's automobiles by vandals. At no time thereafter did petitioner again occupy the premises.

On September 9, 1970, landlord was notified by letter order from the Columbus Building Department that the subject premises had certain "structural faults and damages" together with other defects. (R. p. 19.) The letter order further provided in paragraph 3:

> "Before this building can be occupied there are four sections of concrete and steel floors that must be removed and replaced."

On December 9, 1970, petitioner notified landlord of its option to cancel and terminate the lease because the premises were not restored or made safe within the 90 day period provided in paragraph 11 of the lease. (R. p. 10.)

Thereafter, in December, 1970, landlord started work to restore the premises. (R. p. 49.) For the next several months, repair work to the floor joists and other structural parts of the building were undertaken and finally completed to the satisfaction of the Columbus Building Department on March 30, 1971. (R. pp. 51, 53, 118-123.)

At no time, was petitioner notified by landlord that the premises were again repaired and restored for occupancy or that the premises were going to be leased to third parties. (R. pp. 16, 10, 22.)

Thereafter, on April 1, 1971, part of the premises were leased to third parties from time to time. (R. p. 14.)

The Courts below held that since the premises were not formally declared an "unsafe building" and no formal condemnation order was issued by the Columbus Building Department they were always available for occupancy in spite of the Building Department's letter order to the contrary. They further held that petitioner was responsible for rent that accrued after its notice to the landlord when the premises were not restored within the 90 day period with appropriate setoffs for rents received by the third parties.

In effect, the Franklin County Common Pleas Court decision, affirmed by the Court of Appeals, could find no requirement that notice of restoration of the premises was required in order to hold petitioner liable for rents accruing thereafter, since there was no actual condemnation of the premises as an "unsafe building", although the letter order of the building inspector required compliance and restoration before the building could be occupied.

REASONS FOR GRANTING THE WRIT

The decisions below directly conflict with the due process principles enunciated in this Court's Fuentes v. Shevin ruling.

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), this Court held that procedural due process requires that persons must be notified when their rights are affected in order that those rights may be enjoyed. While the case concerned itself with the replevin of personal property without notice and the opportunity to be heard prior to the physical repossession of that property, the principle of a fair process of decision making whenever depriving a person of his property remains the same, whether that

property be a chattel or whether that property be an accrual of rents.

The lower Courts in effect held that no notice to petitioner was required by landlord after the premises were restored for occupancy. Therefore, no chance was given the petitioner to again reoccupy the premises, had it desired to do so, or to attempt to find substitute tenants to mitigate its damages. The only time at which petitioner could have effectively done anything about this situation was when the premises were again ready for occupancy. At any time thereafter, the deprivation was complete when no notice was given petitioner. In *Fuentes*, this Court held that the "right to notice and hearing as to seizure of a person's goods must be granted at a time when deprivation can still be prevented ***". Although at a later hearing other remedies might be available, such a later hearing cannot undo the arbitrary taking which occurred in the first place.

Being charged with rents that accrued after petitioner's notice to landlord without any further notice from the landlord and an opportunity to make its own decision concerning the future use of the premises effectively deprives petitioner of a valuable property right by way of a money judgment against it rendered by the lower Courts. In so doing, there was a significant taking of petitioner's property which is within the purview of the Due Process Clause.

It may be argued that since petitioner vacated the premises almost two years before and was, therefore, in default for payment of rent, it waived its right to be heard after it gave notice of termination of the lease. Yet the *Fuentes* case does not require that petitioner must "surely prevail at the hearing" before Fourteenth Amendment procedural safeguards apply. It is only im-

portant that a significant property interest is at stake. Certainly the deprivation of money through accrued rents is such a property right.

The lower Courts in their holding that the premises must first have been declared an "unsafe building" and a regular condemnation order issued before any such procedural due process applies is contrary to this Court's holding in the *Fuentes* case. This Court recognized in that case that it was enough that the right to continued possession of goods was open to some dispute before such goods could be repossessed under a conditional sales contract, inasmuch as the seller would have to show at a due process hearing that the buyers had defaulted in their payments. Certainly no less an issue is created where a tenant has notified the landlord of its option to terminate the lease and that the tenant is thereafter deprived of its property by a money judgment for rents accrued after the premises have been restored for occupancy without notice and an opportunity to be heard.

Having had no notice of these facts, petitioner was in no position to take advantage of those rights of reoccupancy that were available to it, yet was required to pay the rent.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Franklin County Court of Appeals and the order of the Ohio Supreme Court overruling petitioner's Motion to Certify the Record.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.
565 EAST BROAD, INC.,
Appellee,

vs.

BILL SWAD CHRYSLER-PLYMOUTH CO.,
Appellant.

1974 TERM
To wit: April 26, 1974

No. 74-143

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.
Motion Fee, $20.00, paid by Henry Maser.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of _____, 19____.

_____
Clerk

_____
Deputy

APPENDIX B
IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

565 EAST BROAD, INC.,
Plaintiff-Appellee,

v.

BILL SWAD CHRYSLER-PLYMOUTH CO.,
Defendant-Appellant.

No. 73AP-208

DECISION

Rendered on December 18, 1973

MR. JOHN L. DAVIES,
88 East Broad Street,
Columbus, Ohio,
For Plaintiff-Appellee.

MR. HENRY MASER,
One East Livingston Avenue,
Columbus, Ohio,
For Defendant-Appellant.

This matter involves the appeal of a judgment for the plaintiff in two consolidated cases tried in the Common Pleas Court of Franklin County, wherein the complaints alleged past-due rents due the plaintiff from the defendant from December 1, 1969, through September 30, 1971. The cases were tried to the court, a jury having been waived. The trial court entered judgment for the plaintiff and the defendant appeals to this court.

The facts of the case, in brief, are as follows:

The parties hereto, on August 15, 1967, entered into a written lease whereby the defendant was to occupy

premises owned by the plaintiff at 1505 East Main Street, Columbus, Ohio, for a period of five years.

The lease contained a paragraph pertaining to the duty of the landlord when the property had been declared to be "unsafe by lawful authority," and the corresponding rights of the tenant when such unsafe condition of the premises had not been alleviated after an expiration of a certain period. Such paragraph is as follows:

> "Paragraph 11. If the demised premises shall be partially destroyed by fire, casualty, or other cause or happening, or be declared unsafe by any lawful authority, then the demised premises shall be promptly restored or made safe by Landlord and a just proportion of the rent specified shall abate until the leased premises shall have been restored or made safe within ninety (90) days after partial destruction or declaration of unsafe conditions; provided, however, that should said premises not be restored to their former condition and/or made safe within ninety (90) days from the date of said partial destruction or declaration of unsafe condition thereof, then the Tenant, at its option, may cancel and terminate this lease in its entirety and if Tenant exercises the option to cancel, then any unearned rent paid in advance shall be refunded to it."

The defendant went into the occupancy of such building after executing the lease, and established its car dealership operation at such premises and so continued to operate thereat until July of 1969, when defendant through its president, Mr. Bill Swad, directed a telegram to the attorney for the plaintiff company indicating in such telegram that the defendant wished to exercise its option to terminate the lease under paragraph 11 thereof, and that an explanatory letter would follow.

On July 25, 1969, the defendant company through its

attorney directed a letter to Mr. Harold Wood, president of the plaintiff company, such letter stating, in pertinent part, as follows, regarding the reason for the termination of said lease:

> "Dear Mr. Wood:
> "Please refer to the Wire received by yourself on behalf of your corporation with respect to the Lease running between 565 East Broad, Inc. and Bill Swad Chrysler-Plymouth Co. We feel you are entitled to an explanation of my client's actions in exercising its option to terminate said Lease.
> "As you know, the area in and around 1505 East Main Street has been steadily deteriorating during the past 18 months. We were forced to halt our sales operation for Datson due to the fact that our employees would not work in this environment. Other considerations such as damage to our automobiles, insurance rates, etc. also contributed to the termination of our sales operation. * * *"

Subsequent to the defendant's removal of its operations from the plaintiff's building, and more particularly on September 9, 1970, the plaintiff received a letter from the building department of the city of Columbus notifying the plaintiff that its building located at 1550 East Main Street had been inspected and that certain conditions needed to be corrected. One of the clauses as contained in such letter is as follows:

> "Before this building can be occupied there are four sections of concrete and steel floor that must be removed and replaced."

On December 9, 1970, the defendant notified the plaintiff of its option to cancel and terminate the lease because the premises had not been restored within the ninety-day period from September 9, 1970, the date of

the before mentioned letter of the Columbus building department.

The record shows that the plaintiff did apply for a building permit and was issued same, and the record further shows that certain improvements were made to the floor and concrete work, and that the work had been checked by the building department and approved as of February 9, 1971. Further, the building inspector's report as submitted in evidence shows that there was a final visual inspection and report which was approved as of March 30, 1972, by the Columbus building department.

The record shows that subsequent to the removal of the defendant's business from the premises, the plaintiff had placed said property in the hands of a real estate broker for purposes of either sale or rental. The record further shows that at various times portions of such building were in fact leased to other parties for various amounts.

The plaintiff brought its action on the basis that such lease was a valid continuing lease for all dates as set forth in its complaint and the court concluded that such lease was in fact a valid and continuing lease and entered judgment for the plaintiff.

We are in agreement with the judgment of the trial court herein, and for the basic reasons as set forth in the decision of such court.

The first assignment of error is based generally on the claim that the building in question was declared to be "unsafe" by a "lawful authority," and that such premises were not restored, or made safe, all in violation of paragraph 11 of the lease. In this regard, the trial court, in weighing the evidence, found that the defendant had relied upon the letter from the Columbus building de-

partment, dated September 9, 1970, regarding a number of things which need be corrected on the premises of the plaintiff and, more particularly, upon the clause within such letter which stated that before the building could be occupied, certain concrete and steel floor sections must be removed and replaced.

The trial court found that there was nothing in such letter which would declare the building to be "unsafe" or an "unsafe building." The trial court further found that sections 4109.01-4109.04 of the Columbus Building Code outlined the procedure to be followed in declaring a building to be an unsafe building, and the trial court further found that there was no evidence that such procedure was followed in this instant case. A review of all the evidence that was before the trial court, and now before this court, will completely substantiate the trial court in this finding.

Specifically, in this regard, section 4109.02 of the Columbus City Code provides that the building inspector shall give written notice to the owner of a building reported or believed to be unsafe, and that such notice shall specifically state the defects that cause the building to be unsafe, and shall steate that the work shall commence within thirty days, and that such specified improvements shall be completed, or the building shall be demolished and removed.

There is nothing in the record to show that the city of Columbus followed any such procedure to declare the instant building as being "unsafe." Therefore, the allegation that there had been a determination of unsafeness by a lawful authority must fail. Such finding of the trial court was neither contrary to law, nor against the manifest weight of the evidence. The first assignment of error of the appellant is hereby dismissed.

As to assignment of error number two, this court having found that there had been no declaration by a lawful authority that the leased premises were "unsafe," we must now find that there would be no duty under such lease to restore such premises within ninety days of such notification as claimed by the defendant-appellant.

Even though the trial court correctly found there to be no duty upon the part of the plaintiff landlord to restore such premises within 90 days, as set forth in paragraph 11 of the lease, the court did review the evidence as such related to structural defects that may have been in existence upon the premises for which repair the landlord had covenanted within the lease.

Most particularly reviewed by the trial court, as to the question of structural defects, was the testimony of Mr. Hardin, expert for the defendant, and the testimony of Mr. Brown, expert for the plaintiff.

The record shows that Mr. Hardin had made a visual examination of the structure, and testified that moisture over a period of time had reached the structural steel reinforcing bars within the second floor cement slabs, and had corroded and spalled the steel bars, and had pushed the concrete away from such steel bars in a number of places. Mr. Hardin concluded that such cement slabs had structural defects. Mr. Hardin made no load bearing tests on such floor sections.

Mr. Brown testified that he had taken load bearing tests upon such second floor, and found "that the structure was able to carry the proper designed loads." (Tr-111.)

However, Mr. Brown apparently recognized some deterioration in the slab and reinforcing steel in that we find the following testimony, on direct (Tr-112):

"Q. All right, and then what was your suggestion as to what needed to be done?

"A. Well, in order to prevent further deterioration of the slab, especially the reinforcing steel within the slab, I recommend that the deteriorated concrete be chipped out and replaced with cement, sand grout, and bonded to the existing concrete reinforcing with epoxy bonding agent."

Therefore, there was testimony, both by the expert witness for the plaintiff as well as the expert witness for the defendant, that there was some deterioration of the second floor, and that such was in need of repairs. The concrete which was poured in sections over and around the steel reinforcing bars could be considered to be part of the structure of such building.

The trial court found that the defendant had not established its second defense that there were structural defects in the building which the landlord had failed to repair as called for by the lease.

Even though we have alluded to the fact that such defects might be considered to be structural in nature, we hold that the trial court did not err in dismissing the second defense, as alleged by the defendant, and this for the following reasons:

It is fundamental that a landlord may enter into an agreement with his tenant to make repairs or improvements to the leased premises. Such an agreement usually is, as here, contained in the instrument of lease.

The lease before us contains a number of provisions in reference to the agreed duty of the landlord to make repairs. First, the landlord has, within paragraph four of the lease before us, warranted that the building and improvements within the leased premises "are in first class order and repair."

Also, the lease contains two additional provisions by which the landlord has agreed to make repairs. One, pursuant to paragraph six, wherein the landlord covenanted to make exterior and structural repairs to the building.

The other reference to repairs to be made by the landlord is contained within the stated paragraph 11 of the lease, wherein the landlord agreed to make repairs within 90 days after partial destruction by fire, casualty, or other cause or happening, or within the same period of time after there has been a declaration by a lawful authority of an "unsafe" condition.

So there are covenants herein providing that in certain instances the landlord must make repairs to the leased premises.

The tenant herein alleged that the need for certain repairs to the demised premises invoked the duty of the landlord to repair, and that the landlord had breached such agreed duty.

Where there has been an alleged breach of an agreement by the landlord to make repairs, one of the generally accepted remedies of the tenant is an action at law to recover damages. 33 Ohio Jurisprudence 2d, Landlord and Tenant, section 184, at page 437. The measure of damages where a lessor fails to make the repairs agreed upon is the difference between the rental value of the premises in the condition they were in without such repair, and what the rental value would have been if the repairs had been made. *Cochran v. Widra* (1931), 35 Ohio Law Abs. 608.

Also, generally it is held that upon a breach of a lessor's promise or covenant to make repairs, the tenant may make the repairs and recover the cost thereof, or the tenant may make the repairs himself and deduct the costs thereof from the rent, or set off the costs of such

repairs in an action by the landlord for rentals. See aforestated 33 Ohio Jurisprudence 2d, at section 371, page 627.

Whatever the obligation of the landlord under this lease to make repairs might be, there looms the more pertinent question of what is the duty of the tenant to continue to pay the rental pursuant to the lease where there is a claimed breach of duty by the landlord to make repairs.

The general rule would appear to be as stated at section 371 of the above referred to text that, "Even though the landlord has agreed to make repairs, the general rule is that breach of such agreement does not excuse nonpayment of rent so long as the tenant remains in possession, because the covenants to repair and to pay rent are usually considered independent."

However, an abatement or adjustment of the rentals under the lease, or in fact a termination thereof, may be provided for within the terms of such lease where certain damage to the property occurs.

In the instant lease, paragraph 11 provides that the tenant's obligation to pay rent shall cease if the property is rendered unfit for the tenant's proposed use. There was no proof offered that such provision is applicable to the facts herein.

Further, paragraph 11 provides for an abatement of rent where the property has been partially destroyed by fire, casualty, or other cause or happening, during the 90-day period, and further provides for cancellation in such event, if not repaired for a 90-day period thereafter. Here, we have held that such clause is not applicable to the facts of this case, so, therefore, there could have been no cancellation of the lease, nor could there have been an abatement of the rentals as provided in this paragraph.

Further, in paragraph 12, there is a provision that a

cancellation may be effected upon a condemnation of such property. Such paragraph is not applicable here.

So, in sum, there is no applicable provision of this lease, as applied to the current facts, that would specifically by its terms have terminated the duty of the tenant to pay the rentals, or would have abated or apportioned such rentals.

Now, as to paragraph four, containing the warranty of condition of the leased property, and paragraph six, containing the agreement of the landlord to make structural repairs, we hold that these covenants, and the duty to pay rent, are generally to be considered as being independent, and so long as the tenant remains in possession the rents must continue to be paid.

The facts in this matter show that the tenant had abandoned the premises for one reason or another. We may only assume the defendant company left because of the neighborhood factors as expressed by the defendant's counsel in his letter to the plaintiff landlord.

However, the abandonment of the premises by the tenant, if such abandonment has not been necessitated by the acts of the landlord amounting to eviction, or unless the abandonment has been occasioned by the untenantable condition of the premises, does not relieve the tenant of his obligation to pay the rent according to the terms of the tenancy. *McAlpin v. Woodruff* (1860), 11 Ohio St. 120; *State v. George* (1878), 34 Ohio St. 657; *Frankel v. Steman* (1915), 92 Ohio St. 197.

Where there has been a breach of the landlord's covenant to repair, the tenant may, in certain instances, be relieved of the responsibility of paying the rents when he has vacated the premises. However, such vacation must not only be related to the complained of condition of the premises, but there must be a substantial breach

by the landlord of his covenant to repair. 32 American Jurisprudence 417, Landlord and Tenant, section 511.

Here, the facts would show that the possession of the premises had originally been relinquished not because of the untenantable condition of the leased premises, or a substantial breach by the landlord of his covenant to repair, but because of the conditions as found by the tenant to exist in the neighborhood generally.

Here we find that the evidence shows there was in fact some structural damage to the building which was in need of repairs, but we hold that such structural defects were not of such nature as to render the building untenantable, so, therefore, the tenant was not forced to vacate such property, and therefore the lease remained in force, and the duty to pay the rentals thereunder continued.

If the tenant had wished to avail himself of any of the aforestated remedies, he could have done so by way of a separate action for damages, or by way of a set off as against rentals claimed, but this apparently the tenant did not wish to do.

This assignment of error number two is therefore dismissed.

As to assignment of error number three, as we have stated previously, there has been no evidence adduced to show that the premises were untenantable or unsafe, justifying the lessee's removal from the premises; therefore, there is no basis upon which to justify the abatement of any rent based upon the restoration clause of paragraph 11 of the lease. We hold there could not be considered to have been a surrender of such property based upon the 90-day restoration clause requirement because such restoration clause is not applicable under the facts as presented here.

The fourth assignment of error of the appellant is to the effect that the reletting of the leased premises by the landlord operates as a surrender when the landlord fails to notify the former tenant of such re-leasing.

In the prior case, No. 9963, between the same parties as herein, this court determined it was the duty of the landlord to mitigate its damages as claimed under a lease as it would be the duty to so mitigate damages under any other contract.

The trial court in the instant case found that the reletting of the premises by the plaintiff was a recognition of such duty to mitigate the damages in conformity to the prior decision of this appellate court. In this finding we must agree, and such prior pronouncement of this court in this regard could be considered as in effect notice that such property should be placed upon the rental market.

In any event, the evidence herein would show that the plaintiff, through the actions of its president, Mr. Wood, had evidenced every desire to rent or re-lease such premises in that a sign for the sale or lease thereof was placed upon the premises shortly after the defendant had removed its business operations from the property. We hold that there has been no surrender of such premises herein by virtue of the plaintiff having re-leased the property to others subsequent to the departure of the defendant, without having given specific notice of such rentals to this defendant. This assignment of error is therefore dismissed.

Based upon all of the foregoing, the judgment of the Common Pleas Court of Franklin County entered in behalf of the plaintiff is hereby affirmed.

STRAUSBAUGH and REILLY, JJ., concur.

APPENDIX C
COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

565 EAST BROAD, INC.,

Plaintiff,

vs.

BILL SWAD CHRYSLER-PLYMOUTH CO.,

Defendant.

Case No. 242307 & 247103

DECISION

Rendered this 2nd day of May, 1973.

GESSAMAN, J.

These two cases were consolidated. Each seeks to recover money due as rent under the terms of a lease. Each case covers a different period of time.

The cases have been submitted to the Court upon the pleadings, the evidence and the briefs of counsel. A jury was waived.

The terms of the lease are not in dispute. The period specified in the lease was from September 1, 1967 to August 31, 1972. The parties to the lease are the parties in these two cases. The plaintiff was lessor and the defendant was lessee.

There is no dispute but that defendant attempted to terminate the lease by telegram to plaintiff dated July 22, 1969 [defendant's Exhibit B] and by letter dated July 25, 1969 [defendant's Exhibit A.] The reasons given at that time for the attempt to terminate the lease were that "the area in and around 1505 East Main Street has been steadily deteriorating during the past 18 months" and that "This whole matter culminated with the riot which took place earlier this week." [defendant's Exhibit

A] There is little, if any, evidence on the claims made in this exhibit.

There is also no dispute that on December 9, 1970 [a year and a half later] the defendant by counsel mailed a letter to Mr. Harold R. Wood, [who testified at trial that he was president and treasurer of plaintiff company] in which defendant advised Mr. Wood that it "is hereby exercising its option to cancel and terminate the lease of the above described premises because they were not restored within the ninety day period from September 9, 1970 ***." This date is the date of a letter from "Charles A. Miller, Building Inspector" to Mr. Harold R. Wood, advising Mr. Wood that "the following conditions need to be corrected." [Defendant's Exhibit D.]

There is also no dispute that defendant vacated the premises in either July or August 1969. Mr. Wood testified that defendant started to move out in July, 1969 and completed moving on August 2, 1969.

There is no dispute that no rent has been paid by defendant to plaintiff for the periods specified in these two cases.

In each case the defendant set forth four identical defenses in its answer.

In its first defense the defendant alleges that certain plate glass [not specified] was smashed in July 1969 and defendant's employees were placed in fear and the premises were rendered unfit for an automobile sales and service establishment. Defendant alleges that plaintiff failed to restore the premises and defendant exercised its options [to terminate] under said lease.

In its second defense defendant alleges that the buildings and appurtenances contained structural defects, required repairs to the roof and hoists and other equipment which plaintiff refused to repair.

In its third defense defendant alleges that on September 9, 1970 "said premises were so declared unfit for occupancy by such lawful authority *** and have not been made safe by plaintiff."

The fourth defense is a general denial.

I.

With respect to the first defense the evidence discloses that certain plate glass windows in the building were broken during a so-called riot. By virtue of the terms of the lease, specifically paragraph 6, the duty to repair any such damage rested upon the defendant. There is no evidence that any damage was done to the premises which placed any duty on the plaintiff to "restore or make safe the premises." There is no evidence on other matters alleged.

In short, the defendant has completely failed to establish its first defense.

II.

The second defense appears to have been an afterthought. In the original notices of cancellation [Defendant's Exhibit A and B] no mention was made of any "structural defects" or of "required repairs to the roof and to the hoists and other equipment." There is no evidence that the defendant ever complained to plaintiff concerning structural defects.

Mr. George Goodburn testified that he [or his employees] installed a new roof on the main roof of the building in May, 1966 and a new roof over the office and part of the showroom in May, 1969.

The only evidence regarding the "structure" came from two men. Mr. Harold Hardin a structural engineer testified on behalf of the defendant. He testified that he made "a visual examination," in the fall of 1970. This

would be more than a year after the defendant moved out. He made some observations of what he saw but he made to tests.

Mr. Elger P. Brown examined the building for the plaintiff on December 7, 1970. He made tests. The substance of his testimony is that he found no structural defects.

In our opinion the defendant has failed to establish its second defense.

III.

The third defense also appears to have been an afterthought. Defendant alleges that the "premises were so declared unfit for occupancy by such lawful authority on September 9, 1970 and have not been made safe by plaintiff."

Counsel for the defendant relies on paragraph 11 of the lease and the letter from Charles A. Miller, Building Inspector to Mr. Harold R. Wood dated September 9, 1970 [Defendant's Exhibit D]. There is nothing in his letter which declares the building to be unsafe or an "unsafe building."

Sections 4109.01—4109.04, inc. of the Columbus City Code outline the procedure to be followed to declare a building an "unsafe building." There is no evidence that this procedure was followed in this case at any time.

Mr. George Hodge, Superintendent of the Building Department of the City of Columbus, testified that Mr. Miller's letter of September 9, 1970 is not a condemnation order. He further testified that he did not find a condemnation order of the building at 1505 E. Main Street in the files of the Building Department.

Our opinion is that defendant has failed to establish its third defense.

IV.

There are no other defenses that the defendant has established.

Counsel for the defendant does discuss the fact that plaintiff did not notify the defendant of the fact that it had leased the premises subsequently on two different occasions. This fact could have no bearing on the questions here involved except to favor the defendant by mitigation of damages. The plaintiff did lease the premises and in so doing was merely following its duty to mitigate its damages. See 565 E. Broad Inc. v. Bill Swad Chrysler-Plymouth Company, No. 9963 decided by the Court of Appeals of this county on July 13, 1971.

Counsel for the plaintiff has contended that the determination of two of the defenses alleged in the cases under consideration were determined in case number 286650 between the same parties in the Franklin County Municipal Court and that that determination, having been affirmed by the Court of Appeals in Case No. 9963, is res judicata.

We are inclined to agree with counsel but we have concluded to decide these two cases on the testimony presented rather than on the narrow issue of res judicata. Nevertheless plaintiff's Exhibits 5 and 6 may be considered as having been admitted into evidence.

Case number 242307 deals with rent at the rate of $1000.00 per month for the last one month of 1969 and the first ten months of 1970. Defendant owes rent for these eleven months less a credit of $500.00 for a total of $10,500.00. An Entry may be drawn accordingly.

The period covered in case number 247103 is for the last two months of 1970 and the first 10 months of 1971 for a total of twelve months. The defendant owes rent for this period in the sum of $12000.00 less a credit of

$2100.00. The balance due the plaintiff from defendant in this case is $10,200.00. An Entry may be drawn accordingly.

MYRON B. GESSAMAN, *Judge*

Appearances:
MR. JOHN L. DAVIES
Attorney for Plaintiff
MR. HENRY MASER
Attorney for Defendant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-2

BILL SWAD CHRYSLER-PLYMOUTH CO.,
Petitioner

v.

565 EAST BROAD, INC.
Respondent

BRIEF IN OPPOSITION TO PETITICN FOR A WRIT OF CERTIORARI

ARGUMENT

1. No Federal Question Was Raised In The State Courts.

Supreme Court Rule 23, 1(f) requires that the Petition for Writ of Certiorari shall state specifically how, where and when the federal question sought to be reviewed was raised in the state courts and how it was disposed of by the state courts. The petition herein states that the federal question sought to be reviewed is a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution. Nowhere in the Petition is there one word which meets the requirements of Supreme Court Rule 23, 1(f) as to this federal question. The reason is obvious—it is impossible to do so. No question was ever raised at any stage of the proceedings in any of the state courts as to violation of the Due Process Clause of the Fourteenth Amendment by 565 East

Broad, Inc. or by any of the state courts in the subject action. A review of the opinion of the Court of Appeals of Franklin County, Ohio, found in Appendix B of the Petition, and of the Court of Common Pleas of Franklin County, Ohio, found in Appendix C, affirms this statement.

The opinion of the Court of Appeals sets forth each assignment of error made by Bill Swad Chrysler-Plymouth Company in its appeal. These assignments are set forth as follows in Appendix B of the Petition for Writ of Certiorari:

> First Assignment of Error—bottom of page 13 of petition;
>
> Second Assignment of Error—top of page 15 of petition;
>
> Third Assignment of Error—bottom of page 20 of petition;
>
> Fourth Assignment of Error—top of page 21 of petition.

Nowhere in these assignments of error was any federal question presented.

It is interesting to note that the question of notice (the basis of the purported federal question) was raised in the Fourth Assignment of Error in the Court of Appeals. It is further interesting to note that this assignment of error was based upon the claim that the reletting of the premises by the landlord, where no notice of its intention to do so was given to the lessee, operated as a surrender under the lease and terminated the lease. This was the sole argument advanced in the Court of Appeals on the matter of notice, was upon an entirely different theory than that which is now advanced as the basis for the granting of the Petition, and

obviously had nothing to do with any supposed violation of the Fourteenth Amendment.

It is fundamental, of course, that this court does not have jurisdiction if a review of a judgment of a state court is sought, unless a federal question has been properly raised somewhere in the proceedings in the state court. Justice White very succinctly states the position of this court on this subject in *Cardinale* vs. *Louisiana*, 394 U.S. 437:

> Page 438: "It was very early established that the Court will not decide federal constitutional questions raised here for the first time on review of state court decisions. In *Crowell* vs. *Randall*, 10 Pet. 368 (1836) Justice Story reviewed the earlier cases commencing with *Owings* vs. *Norwood's Lessee*, 5 Cranch 344 (1809) and came to the conclusion that the Judiciary Act of 1879 c 20 Sec. 25, 1 Stat. 85 vested this court with no jurisdiction unless a federal question was raised and decided below. 'If both of these do not appear on the record the appellate jurisdiction fails', 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, *Miller* vs. *Nicholls*, 4 *Wheat.* 311, 315 (1819) and since e.g. (citing cases)."

This court has consistently adhered to this position, as evidenced by every reported opinion where the question has been raised.

Lacking the necessary foundation for a review of the judgments of the state courts by this court in this case, the Petition for Writ of Certiorari herein must surely fail.

2. Fuentes vs. Shevin Not Applicable.

Petitioner has based its reason for granting the writ

on the case of Fuentes vs. Shevin, 407 U.S. 67. A review of the opinion in that case reveals that it applies to replevin actions and the procedure thereunder in two states. Under that procedure, property may be taken by legal process prior to, and without hearing as to, the rights to that property. In other words, the question raised in that action was as to the constitutionality of statutes which would permit the taking of a person's property without notice to that person and without a prior hearing as to the rights to that property.

The facts in that case and the determination by this court of the law in that case have no bearing upon, nor any resemblance to, the facts in the present case and the legal questions involved. No property was taken here. The only question raised is whether the lessee, the petitioner herein, was entitled to, and should have had some sort of notice from the landlord that the premises were being sublet by the landlord.

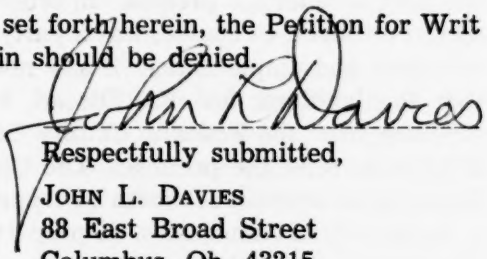
Petitioner's claim is based upon the assumption that the building involved had been condemned and thus made unfit for occupancy and later restored to fitness, at which time Petitioner says it should have been notified. Both the trial court and the Court of Appeals found that the building had not been condemned and, accordingly, had always been available for occupancy. Thus, petitioner's claim is based upon a completely false premise. The truth of the matter was, as found by both the trial court and the Court of Appeals, that petitioner voluntarily abandoned the premises (more than a year before the incident on which it bases its notice claim), never thereafter re-entered them, and made no attempt to either make use of them or to sublet them. To the contrary, in a previous trial involving the same parties, the same premises, and the same lease, the Franklin

County Court of Appeals had held that the landlord had the duty to relet the premises in order to mitigate damages. Petitioner, of course, was a party to the action and therefore had ample notice (if any notice was required) that the landlord, 565 East Broad, Inc., was under a mandate from the Franklin County Court of Appeals to attempt to relet the premises. The Court of Appeals so found in its opinion set forth in Appendix B (page 21).

Under any circumstances, no property was taken from the lessee by the reletting of the premises by the lessor. To the contrary, it was to the benefit of the lessee since any subletting reduced the amount which it was required to pay. Accordingly, there was no taking of any property of the lessee. To the contrary, there was actually an addition to the property of the lessee, by virtue of the reduction of its liability on the lease.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari herein should be denied.



Respectfully submitted,

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